

**Before the  
Federal Communications Commission  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
	)	MB Docket No. 08-214
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P
Complainant	)	
v.	)	
Time Warner Cable Inc.	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7822-P
Complainant	)	
v.	)	
Bright House Networks, LLC,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7829-P
Complainant	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	

To: The Commission

**PETITION FOR RECONSIDERATION**

Herring Broadcasting, Inc. d/b/a WealthTV

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Dated: July 13, 2011

## SUMMARY

Recently ascertained facts compel that the Commission reconsider its decision to adopt the Administrative Law Judge's *Recommended Decision* in the program carriage complaint proceedings between and among WealthTV and Time Warner Cable, Bright House Networks, Cox, and Comcast Corporation (collectively, the "Multichannel Video Programming Distributors" or "MVPDs") and remand the matter for further proceedings, including re-hearing, as may be appropriate, or such other proceedings as may be necessary or appropriate.

As discussed herein, given the totality of the circumstances, there are serious and material questions as to whether the Commission's prior decision has been irreparably tainted by the involvement of former Commission staff – and indeed a Member of the Commission – who have "switched sides" to go work for one of the MVPDs during the pendency of this case. Documents recently obtained by WealthTV via a Freedom of Information Act ("FOIA") request leave open legitimate questions as to the extent to which Commissioner Meredith Baker fully and completely recused herself from consideration of the WealthTV complaint proceedings. In addition, answers have not been provided regarding the efforts of Commissioner Baker's staff on this case during the approximately month and a half that she reportedly recused herself from matters involving Comcast.

Unfortunately, questions pertaining to Commissioner Baker's or her staff's otherwise prohibited participation seriously underscore questions about the "revolving-door" involvement of Commission employees in this matter, which have risen to a level that cannot be ignored. For example, in addition to the situation of former Commissioner Baker, Christina Pauzé, a former Legal Advisor for Media Issues to Commissioner McDowell was personally and substantially involved in the WealthTV complaint proceeding and had numerous interactions with WealthTV.

However, after leaving the Commission, she joined the staff of Time Warner and appeared at the hearing with her employer, MVPD Time Warner.

In light of the facts involving former Commissioner Baker, WealthTV requests that the Commission review the conduct of the former Commission employees discussed herein to determine if their actions run afoul of the letter or spirit of the federal ethics rules. Given known facts, reconsideration of this matter is appropriate to ensure that the Commission's "adjudicatory processes remain above reproach"<sup>1</sup> and to ensure "the public's trust in the integrity and impartiality of their government."<sup>2</sup>

Reconsideration is also appropriate in light of the lack of appropriate and consistent standards applicable to program carriage cases. It is clear from the record in this proceeding, other recent program carriage rulings and the fact that the Commission now has underway a revamping of the program carriage rules that the WealthTV case was considered and ruled on without proper standards or consistency in decisionmaking.

As discussed in greater detail below, there are three specific areas where this lack of structure is apparent. First, the Commission expressly notes in the Order that it lacked guidance as to how to deal with issues of burden of proof. Second, in the Tennis Channel HDO, *infra*, the Media Bureau now concedes that the Commission applied an inconsistent and incorrect standard in the WealthTV HDO regarding the prima facie case made by WealthTV. Third, it is clear from the Media Bureau Comments in Tennis Channel Case, *infra*, that there are no standards or inconsistent standards applied in making the determination of what programming is "substantially similar".

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<sup>1</sup> *In Re Applications of Commercial Radio Institute, Inc. Columbus, Ohio, et al.*, Memorandum Opinion and Order, 73 FCC 2d 776, 783 (1979).

<sup>2</sup> Statement of Commissioner Robert M. McDowell, 2006 FCC LEXIS 6584, \*11 (Dec. 18, 2006).

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Complainant	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	

To: The Commission

**Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”)**, pursuant to Section 405(a) of the Communications Act of 1934, as amended (the “Act”)<sup>3</sup> and Section 1.106 of the Commission’s Rules,<sup>4</sup> hereby submits this Petition for Reconsideration of the *Memorandum Opinion and Order* (“Order”) released by the Federal Communications Commission (“Commission”) on June

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<sup>3</sup> 47 U.S.C. § 405(a).

<sup>4</sup> 47 C.F.R. § 1.106.

13, 2011 regarding program carriage disputes between WealthTV and Time Warner Cable, Inc. (“TWC”), Bright House Networks, LLC (“BHN”), Cox Communications, Inc. (“Cox”), and Comcast Corporation (“Comcast”) (collectively, the “Multichannel Video Programming Distributors” or “MVPDs”).<sup>5</sup> Without waiving or abandoning any of its Exceptions and preserving all rights with respect thereto, WealthTV submits that new questions of fact have arisen pertaining to (a) the material involvement in this proceeding by Commission employees who subsequently, and during the pendency of the proceeding, accepted employment with the MVPDs; and (b) the Commission’s lack of appropriate and consistent standards applicable to program carriage cases.

As set forth herein, WealthTV requests that the Commission reverse the Administrative Law Judge’s (“ALJ”) *Recommended Decision* and remand the matter for further proceedings, including re-hearing, as may be appropriate, or initiate such other proceedings as necessary or appropriate.<sup>6</sup>

## **I. FACTS**

In 2007 through 2008, Wealth TV filed program carriage complaints with the Commission, pursuant to Section 616 of the Communications Act of 1934 (“Section 616”), 47 U.S.C. § 536, and Section 76.1301(c) of the Commission’s Rules, 47 C.F.R. § 76.1301(c) (the “Rules”). WealthTV claimed it had been unreasonably restrained its ability to compete fairly with the MVPDs’ affiliated network, MOJO, because WealthTV is not affiliated with the MVPDs.<sup>7</sup>

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<sup>5</sup> *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Order, FCC 11-94, MB Docket No. 08-214, (released June 13, 2011) (the “Order”) affirming the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 09 D-01 (ALJ rel. Oct. 14, 2009) (“*Recommended Decision*”).

<sup>6</sup> This Petition for Reconsideration is timely filed. *See* 47 C.F.R. § 1.106(f).

<sup>7</sup> Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against TWC, File No. CSR-7709-P (filed December 20, 2007); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against BHN, File No. CSR-7822-P (filed March 13, 2008); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Cox, File

WealthTV is a premier lifestyle and entertainment network targeting an upscale, male skewed audience. *WealthTV* is distributed by the major telecommunications video providers and numerous small and medium cable operators. However, it is not carried on any of the nation's largest cable systems operated by the MVPDs.

On October 10, 2008, the Media Bureau adopted a *Memorandum Opinion and Hearing Designation Order* (“HDO”),<sup>8</sup> which concluded that WealthTV had established a *prima facie* showing that each of the MVPDs had discriminated against it in violation of the program carriage rules, directed the ALJ to resolve factual disputes, and return a recommended decision and remedy, if necessary, in a specific timeframe.<sup>9</sup> Despite the Media Bureau's finding that WealthTV had established a *prima facie* showing of discrimination, the ALJ determined to conduct a *de novo* review and, WealthTV contends, erroneously shifted the burden of production and proof back on WealthTV.<sup>10</sup>

WealthTV moved for revocation of the HDO<sup>11</sup> and, by a December 24, 2008 *Memorandum Opinion and Order* (“December 24 Order”), the Media Bureau found that the ALJ exceeded his authority by setting a hearing date beyond the HDO's 60-day deadline for issuing a recommended decision.

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No. CSR-7829-P (filed March 27, 2008); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Comcast, File No. CSR-7907-P (filed April 21, 2008).

<sup>8</sup> *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.* Memorandum Opinion and Hearing Designation Order, MB Docket No. 08-214, 23 FCC Rcd 14787 (MB 2008) (“HDO”).

<sup>9</sup> *Id.* at ¶¶ 24, 35, 46, 57, 120.

<sup>10</sup> *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 08M-44 (ALJ, rel. Oct. 23, 2008).

<sup>11</sup> *Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, MB Docket No. 08-214 (Nov. 24, 2008) (“HDO Revocation Motion”).

The Media Bureau concluded that it would resolve the discrimination complaints based on the existing record.<sup>12</sup> *Sua sponte*, on January 16, 2009, the Commission rescinded the Media Bureau's *December 24 Order* and instructed the ALJ: (1) to issue a revised procedural and hearing order updating the schedule previously announced; and (2) to issue recommended decisions and remedies.<sup>13</sup> As a result, WealthTV became stuck in the middle of an internal power struggle between the Media Bureau and the ALJ.

After a two-week hearing, the ALJ issued the *Recommended Decision* in which he shifted the burden of production and of proof to WealthTV in contravention of the HDO.

On November 16, 2009, WealthTV filed Exceptions to the *Recommended Decision*, and about a year and half later, on June 13, 2011, the Commission issued the *Order* adopting the *Recommended Decision* and denying Wealth's exceptions and other requests.<sup>14</sup>

While the Exceptions were pending before the full Commission, Commissioner Baker announced on May 11, 2011 that she was leaving the Commission to take a senior position at NBCUniversal, a subsidiary of Comcast.<sup>15</sup> Commissioner Baker subsequently announced that she

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<sup>12</sup> *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Memorandum Opinion and Order, 23 FCC Rcd 18316 (MB 2008) ("*December 24 Order*").

<sup>13</sup> *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, 24 FCC Rcd 1581(¶ 2) (2009); *see also In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 09M-11 (ALJ, rel. Feb. 2, 2009).

<sup>14</sup> *In the Matter of Herring Broadcasting d/b/a WealthTV, et al.*, Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 08-214 (Nov. 16, 2009).

<sup>15</sup> *See* News, Statement of Commissioner Meredith Atwell Baker Announcing Her Departure from the FCC, rel. May 11, 2011, *available at*: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306519A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306519A1.pdf) (last visited July 11, 2011); News, Statement of Commissioner Meredith Atwell Baker, rel. May 13, 2011, *available at*: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306569A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306569A1.pdf) (last visited July 11, 2011).



had recused herself from any matters involving Comcast or NBCUniversal as of April 18, 2011, and that she had not participated or voted any item since entering discussions about an offer for potential employment. Upon an inquiry from Representative Darrel Issa (R-CA) (Chairman of the House Committee on Oversight and Government Reform) about Commissioner Baker's departure, the Commission provided further information about the applicable federal ethics requirements.<sup>16</sup> However, the response does not directly address any involvement Commissioner Baker's staff may or may not have continued to have in the pending WealthTV matter.

This was not the only instance of a "revolving door" in the decisionmaking process in this case, but rather the culmination of a "revolving door" process where the decisionmakers were apparently compromised by the MVPDs. Christina Pauzé, the Legal Advisor for Media Issues to Commissioner McDowell during this time, was personally and substantially involved in the dispute between WealthTV and the MVPDs on behalf of the government. On numerous occasions, including just one month before WealthTV filed its carriage access complaint against Time Warner, WealthTV senior management met with Ms. Pauzé seeking guidance and providing detailed information on the discriminatory conduct it faced specifically by TWC and the other MVPDs.<sup>17</sup> Multiple times thereafter, WealthTV corresponded with and met in person with Ms. Pauzé regarding carriage access abuses. WealthTV provided Ms. Pauzé details about the network and its case against TWC.

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<sup>16</sup> Letter from Chairman Darrell Issa to Chairman Julius Genachowski (May 18, 2011) *available at*: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306973A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306973A2.pdf) (last visited July 11, 2011); Letter from Chairman Julius Genachowski to Chairman Darrell Issa (May 26, 2011) *available at*: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306973A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306973A1.pdf).

<sup>17</sup> See Wealth TV, ERRATUM – Ex Parte Notices Incorrectly Filed in MB 07-47, MB 07-42, received on Nov. 29, 2007.

On August 25, 2008, it was announced that Ms. Pauzé was joining TWC where, “She will be responsible for leading Time Warner Cable's advocacy efforts before the Federal Communications Commission on cable and media-related issues.”<sup>18</sup> After leaving the Commission, Ms. Pauzé, by all appearances, remained directly involved in the matter between WealthTV and the MVPDs, but this time on behalf of TWC – even though she had served as Commissioner McDowell’s legal advisor on this matter. Ms. Pauzé appeared at the hearing before the ALJ, sitting with defendant TWC, and was copied on emails regarding the case.

Similarly, during the pendency of the WealthTV complaints, Rudy Brioché served as a Legal Advisor to Commissioner Adelstein for media regulatory issues. Mr. Brioché was closely involved in the matter and is believed to have participated in numerous meetings with Commission staff as well as representatives of WealthTV. On July 27, 2009, Mr. Brioché joined defendant Comcast as its Senior Director of External Affairs and Public Policy Counsel.

In addition, former FCC staff member Rick Chessen was also deeply involved in this proceeding as Senior Legal Advisor to Commissioner (and then acting Chairman) Copps. On numerous occasions, WealthTV’s senior management and its attorneys sought the assistance of Mr. Chessen and provided him with detailed information on the discriminatory conduct WealthTV faced by the MVPDs.<sup>19</sup> On August 28, 2009, Mr. Chessen left the Commission and joined the National

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<sup>18</sup> Time Warner Cable Names Cristina Pauze Vice President, Federal Regulatory Affairs, *Business Wire*, available at: [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2008\\_August\\_25/ai\\_n28029442/](http://findarticles.com/p/articles/mi_m0EIN/is_2008_August_25/ai_n28029442/) (last visited July 11, 2011).

<sup>19</sup> See e.g., Wealth TV, ERRATUM – Ex Parte Notices Incorrectly Filed in MB 07-47, MB 07-42, filed on Nov. 29, 2007. Mr. Chessen now represents NCTA on program carriage issues in direct opposition to the positions for which WealthTV sought Mr. Chessen’s assistance while he was at the Commission. See e.g., NCTA, In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42 (filed July 6, 2011).

Cable Television Association (“NCTA”) as its Senior Vice President, Law & Regulatory Policy.

Defendants Comcast, Cox and TWC are among NCTA’s largest and most influential members and financial supporters.

On May 12, 2011, the day after Baker announced that she was leaving the Commission and over a month before the *Order* was released, WealthTV sent a FOIA request to the Commission seeking all records regarding:<sup>20</sup>

- When did Commissioner Baker and Comcast initially have job solicitation discussions?
- When did Commissioner Baker notify the FCC that she was recusing herself on any issues due to job related discussions with Comcast? What items did Commissioner Baker recuse herself from?
- Did Commissioner Baker or her staff participate in discussions of WealthTV’s complaints, including but not limited to File No. CSR-7907-P, after she initially engaged in job solicitation discussions with Comcast?
- With respect to WealthTV’s carriage access complaints, including but not limited to File No. CSR-7907-P Against Comcast, has Commissioner Baker or her staff been given access to the circulated item(s) post Commissioner Baker’s initial job solicitation with Comcast?
- Has Commissioner Baker or her staff engaged in any discussion under Docket No. 07-42 after she participated in job related discussions with Comcast?

More than six weeks later, but following release of the *Order* affirming the *Recommended Decision*, WealthTV received a response to its request that contained 26 pages of documents – including a copy of a publically available news release and some redacted emails.<sup>21</sup> The subject lines of the redacted emails included: “Pat Carney”, “Voting”, “Recusal”, “Press is going to ask me”, and “Letter to House Commerce Committee.” The FOIA response did include a list of Commissioner Baker’s recusals between August 4, 2009 and June 3, 2011. That list did not include any mention of the

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<sup>20</sup> See Exhibit B, WealthTV’s FOIA Request of May 12, 2011.

<sup>21</sup> See Exhibit C, Response to WealthTV’s FOIA Request of May 12, 2011.

complaints between WealthTV and the MVPDs. The response also included a transcript of a Question and Answer (“Q&A”) session by Commission General Counsel Austin Schlick on May 12, 2011. In the Q&A, Mr. Schlick was asked whether Commissioner Baker’s staff had recused themselves as well. He did not answer the question directly, but instead said: “I don’t know why they would have a meeting on an item on which she is recused.” The FOIA response did not provide any additional insight into Commissioner Baker’s or her staff’s participation in the pending complaints between WealthTV and the MVPDs.

In addition, on May 20, 2011, Mr. Robert Herring, CEO of WealthTV, sent a second FOIA request to the Commission seeking documents regarding other former senior Commission employees, Ms. Pauzé, Mr. Brioché, Mr. Chessen, and Ms. Catherine Bohigian. Specifically, WealthTV asked for documents regarding:<sup>22</sup>

- When did Mr. Chessen report that he was directly or indirectly involved in employment discussions with the NCTA?
- When did Mr. Brioché report that he was directly or indirectly involved in employment discussions with Comcast?
- When did Ms. Pauzé report that she was or indirectly involved in employment discussions with Time Warner Cable?
- When did Ms. Bohigian report that she was directly or indirectly involved in employment discussions with Cablevision?
- When did each former FCC official initially have direct or indirect employment discussions with the cable operators or cable associations shown above?
- When did each former FCC official notify the FCC that she/he was recusing himself /herself on any issues due to job related discussions that posed a conflict of interest?
- When did the FCC take steps to ensure that these four former FCC officials did not work on items that may pose a conflict of interest?

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<sup>22</sup> See Exhibit D, WealthTV’s FOIA Request of May 20, 2011.

- With respect to WealthTV’s carriage access discrimination complaints (CSR-7907-P, CSR-7829-P, CSR-7822-P, CSR-7709-P), did any of the four former FCC officials engage in any discussions, communications, meetings, or exchanges of opinion, as FCC representatives AFTER directly or indirectly becoming involved in employment discussions as cited above.

The Commission responded to this request on June 28, 2011 by producing one single page: an email in which Ms. Bohigian informed Patrick Carney that she had turned down an offer from another cable television provider, Cablevision.<sup>23</sup> No other response was provided.<sup>24</sup>

## **II. RECONSIDERATION IS PROPER BECAUSE OF UNRESOLVED ETHICS CONCERNS AND INADEQUATE AND INCONSISTENT PROCEDURAL STANDARDS**

### ***A. Federal Law Grants the Commission Broad Discretion to Reconsider its Adoption of the Recommended Decision***

The Commission has broad discretion to reconsider its adoption of the *Recommended Decision* in light of new and important developments. Specifically, Section 405 of the Communications Act of 1934 grants the Commission authority “in its discretion, to grant such a [petition for] reconsideration if sufficient reason therefor be made to appear.”<sup>25</sup>

As discussed more fully below, federal ethics rules and Commission precedent recognize the Commission’s broad discretion to pursue a proper remedy. For example, federal regulations regarding standards of ethical conduct for employees of the executive branch recognize that a federal agency, such as the Commission, may find it appropriate to take “corrective” action in response to a violation of federal ethics laws, and defines “corrective” action broadly to include “any action necessary to remedy a past violation or prevent a continuing violation.”<sup>26</sup>

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<sup>23</sup> See Exhibit E, Response to WealthTV’s FOIA Request of May 20, 2011.

<sup>24</sup> See Exhibit F, Further Correspondence Regarding FOIA Request of May 20, 2011.

<sup>25</sup> 47 U.S.C. § 405(a).

<sup>26</sup> 5 C.F.R. §§ 2635.102(e), .106.

WealthTV requests that the Commission exercise this broad discretion by reversing the ALJ's *Recommended Decision*, and the Commission's subsequent *Order*, and remand the matter for further proceedings, including re-hearing, as may be appropriate, or such other proceedings as may be necessary or appropriate to review the involvement of Commissioner Baker and her staff in the Commission's *Order* affirming the *Recommended Decision*.

***B. Serious and Material Questions Remain Regarding the "Revolving Door" Involvement of Commission Employees in this Proceeding***

The totality of the circumstances, capped by Commissioner Baker's departure to work for Comcast, raises serious and material questions about the validity of the Commission's *Order*. Further investigation by the Commission is needed and reconsideration of the *Recommended Decision* is warranted to ensure the integrity of the Commission's processes.

WealthTV held ex parte meetings and shared both public and confidential information with the media advisors for Commissioners Capps, Adelstein, and McDowell and, in each case, those advisors left during the pendency of the proceeding and took high-level employment positions with the MVPDs or within the cable industry. WealthTV has through two FOIA requests sought to determine what involvement these staff members had in the proceeding, but the FOIA responses were not dispositive.<sup>27</sup>

The ethical issues here relate not to a single individual or single event, but rather to the totality of circumstances where a Commissioner and three senior advisors to Commissioners were involved in these matters and left to join one of the MVPDs or the NCTA, a trade association representing the interests of the MVPDs.

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<sup>27</sup> See Exhibit B, WealthTV's FOIA Request of May 12, 2011; *Exhibit C*, Response to WealthTV's FOIA Request of May 12, 2011; Exhibit D, WealthTV's FOIA Request of May 20, 2011; Exhibit E, Response to WealthTV's FOIA Request of May 20, 2011; Exhibit F, Further Correspondence Regarding FOIA Request of May 20, 2011.

Among all such persons, perhaps the most disconcerting questions pertain to the possible involvement in this proceeding by Commissioner Meredith Baker and/or her staff at any time after approximately April 18, 2011, the date on which Commissioner Baker notified the Commission's General Counsel, Austin Schlick, that she intended to discuss employment with Comcast. The *Order* in this proceeding went on circulation for the Commissioners' review and vote on May 5, 2011. Six days later, on May 11, Commissioner Baker announced that she would be resigning from the Commission to join defendant Comcast, which she did as of June 3, 2011. The *Order*, in favor of Comcast and the other MVPDs, was adopted seven days later on June 10, 2011.

Nothing in the *Order* offers any indication as to whether or not Commissioner Baker or her staff engaged in any discussions or deliberations regarding the matter or whether Commissioner Baker formally recused herself from any and all discussion of the matter.

WealthTV's FOIA request of May 12, 2011 expressly sought all records pertaining to Commissioner Baker's resignation, her recusal and the recusal of her staff. The records provided show various Commission agenda items on which Commissioner Baker was recused, but nothing directly pertaining to this proceeding. Likewise there is nothing in the record provided in the FOIA responses that reflects whether Commissioner Baker's *staff* participated in any meetings involving this proceeding or the *Order* from the time that Commissioner Baker first notified the Commission's General Counsel of her conversations with Comcast regarding employment (on or about April 18, 2011).

More specifically, serious and material questions remain as to whether Commissioner Baker has fully and completely complied with Section 208 of Title 18 of the U.S. Code and its implementing rules.<sup>28</sup> Section 208 establishes penalties if "an officer or employee of the executive

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<sup>28</sup> 18 U.S.C. § 208.

branch of the United States Government, or of any independent agency of the United States, . . . participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, . . . any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.”

Here, we know that Commissioner Baker entered into employment negotiations with Comcast approximately two months before the *Order* adopting the *Recommended Decision* was released and that she was in those negotiations when the *Order* was put on circulation. We completely acknowledge statements by Commissioner Baker and Mr. Schlick that Commissioner Baker recused herself from matters involving Comcast and NBCUniversal in April and that she has “complied with the legal and ethical laws.”<sup>29</sup>

However, there are a number of unanswered questions that raise serious concerns. First, the information in the FOIA request does not specifically indicate that Commissioner Baker recused herself fully and completely from the pending WealthTV matter. Second, despite reasonable efforts by WealthTV, answers have not been provided regarding the involvement of Commissioner Baker’s staff during the approximately month and a half that she had reportedly recused herself from Comcast matters. In fact, when given the chance to set the record straight, the Commission’s General Counsel failed to clearly respond about the continued involvement of Commissioner Baker’s

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<sup>29</sup> News, Statement of Commissioner Meredith Atwell Baker, rel. May 13, 2011, *available at*: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-306569A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306569A1.pdf) (last visited July 11, 2011).



staff. In addition, the response to the FOIA request does not provide any documentation to confirm the recusal of Commissioner Baker's staff.

The actions of Commissioner Baker's staff are so vitally important because the Office of Government Ethics ("OGE") rules implementing Section 208 explain that a person is considered to have "personally" been involved in a matter if they participated directly or if there was "direct and active supervision of the participation of a subordinate in the matter."<sup>30</sup> In fact, the implementing rules also suggest that at times it may be wise for a senior official seeking employment to provide subordinates with written notification of the official's disqualification.<sup>31</sup> Whether Commissioner Baker notified her staff of her pending recusal and employment is a question that remains unanswered. No such document appears to exist, and a full investigation of the facts and circumstances related to the decisionmaking process in this case is merited.

The questions pertaining to Commissioner Baker's or her staff's involvement is just one set of questions about "revolving-door" involvement of Commission staff. As mentioned earlier, Christina Pauzé was the Legal Advisor for Media Issues to Commissioner McDowell and, during this time, was personally and substantially involved in the dispute between WealthTV and the MVPDs. She later worked for TWC on this same exact matter. Similarly, during the pendency of the WealthTV complaints, Rudy Brioché served as a Legal Advisor to Commissioner Adelstein for media regulatory issues, and then went to work for Comcast as its Senior Director of External Affairs and Public Policy Counsel. Former FCC staff member Rick Chesson also was deeply involved in this matter as Senior Legal Advisor to Commissioner Copps, and later joined the NCTA

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<sup>30</sup> See 5 C.F.R. §§ 2635.603(d); 2635.402(b)(4).

<sup>31</sup> See 5 C.F.R. § 2635.604(c), example 3.

as its Senior Vice President, Law & Regulatory Policy, where the MVPDs are among NCTA's largest and most influential members and financial supporters.

Section 207(a) of Title 18 of the U.S. Code prohibits former Commission employees from switching sides on a matter. Specifically, the statute states:

Any person who is an officer or employee . . . of the executive branch of the United States (including any independent agency of the United States), . . . and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any . . . agency . . . on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter— (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest, (B) in which the person participated personally and substantially as such officer or employee, and (C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.

As with Section 208, the OGE's rules set out guidance for how to apply this prohibition. For example, the rules acknowledge that mere physical presence can signal a person's intent to influence a proceeding and sets out factors that may be considered in determining whether federal law has been breached.<sup>32</sup> From the limited information we have, there is a reasonable basis to be concerned that Ms. Pauzé's attendance at the hearing and participation on emails may have signaled an intent to influence. Specifically, WealthTV executives observed that Ms. Pauzé's presence in a proceeding before an ALJ was "relatively prominent", we assume that she was paid for being at the hearing, and given the totality of the circumstances it is hard to imagine that her involvement was merely for informal purposes. As with Commissioner Baker, WealthTV does not claim to know all the facts, but instead is alarmed by what it does know and the pattern that has developed.

In addition, WealthTV's FOIA request for information regarding Ms. Pauzé's, Mr. Brioché's, and Mr. Chesson's determinations to leave the Commission and accept employment with a MVPD

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<sup>32</sup> 5 C.F.R. § 2641.201(e)(4).

or NCTA, revealed only a single document, one unrelated to Ms. Pauzé, Mr. Brioché, and Mr. Chessen.<sup>33</sup> In fact, WealthTV was so surprised by the lack of documents that it sent a follow up letter to the Commission to confirm its understanding and was assured that the agency's FOIA response was complete.<sup>34</sup> Therefore, we know that there is no documentation at all to substantiate that Ms. Pauzé, Mr. Brioché, and Mr. Chessen either recused themselves from consideration of this matter once they entered negotiations for employment with the MVPDs or NCTA or that they complied with Section 208 and the implementing rules when they left to join a MVPD or the NCTA. There is obvious basis for concern.

Thus, to summarize, at least four of the Commission's employees who had high level involvement in this matter left the Commission during the pendency of the proceeding to work for TWC (Pauzé), Comcast (Baker and Brioché), and a defendant-dominated organization, NCTA (Chessén). Whether Mr. Brioché or Mr. Chessén was engaged in any direct activity involving this specific proceeding after leaving the Commission is not known. However, it appears certain that Ms. Pauzé was involved in the proceeding on behalf of TWC after leaving the Commission, as evidenced by her presence at the table of TWC during the hearing and being copied on emails. The involvement of Commissioner Baker and/or her staff after she entered into employment discussions with Comcast cannot be fully and completely ascertained either by the *Order* or from the FOIA responses, but nothing clearly reflects the recusal or lack of involvement of Commissioner Baker's staff in this proceeding.

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<sup>33</sup> Exhibit D, WealthTV's FOIA Request of May 20, 2011; Exhibit E, Response to WealthTV's FOIA Request of May 20, 2011.

<sup>34</sup> Exhibit F, Further Correspondence Regarding FOIA Request of May 20, 2011.

It is less the acts of any one individual in this proceeding as it is the fact that four key Commission employees who were involved in this case “switched sides” in the midst of the proceeding giving rise to, if nothing else, the appearance of improper conduct. As the Commission has stated:

When *any* former Commission employee who has been involved with a particular matter decides to act as the representative for another person on that matter, such “switching of sides” undermines confidence in the fairness of proceedings and creates the impression that personal influence, gained by Commission affiliation, is decisive. Similarly, when a former *Commissioner* or *senior* employee assists in representing another by personal presence at an appearance before the Commission regarding a matter which is in dispute, such assistance suggests an attempt to use personal influence and the possible unfair use of information unavailable to others.<sup>35</sup>

WealthTV requests that the Commission investigate the conduct of the former Commission employees discussed herein to determine if their actions run afoul of the letter or spirit of the federal ethics rules, and that the Commission exercise its broad authority to reconsider its decision to adopt the ALJ *Recommended Decision*.

As mentioned above, federal regulations regarding standards of ethical conduct for employees of the executive branch recognize that a federal agency, such as the Commission, may find it appropriate to take “corrective” action in response to a violation of federal ethics laws, and defines “corrective” action broadly to include “any action necessary to remedy a past violation or prevent a continuing violation.”<sup>36</sup>

In addition, Commission precedent recognizes that even when the Commission’s ethics regulations have not technically been violated, corrective action may be required to ensure the integrity of the administrative process. In *Commercial Radio Institute*, the Commission found that it

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<sup>35</sup> *In re: Amendment of Parts 0, 1, and 19 of the Rules and Regulations in accordance with the Ethics in Government Act of 1978*, Order, 95 FCC 2d 415, 416 (1983).

<sup>36</sup> 5 C.F.R. §§ 2635.102(e), .106.

was appropriate to prohibit an attorney from representing a client in a matter before an ALJ even though the Commission's ethics rules were not technically violated "in order to preserve the integrity of our adjudicatory processes."<sup>37</sup> In reaching its conclusion, the Commission found support in the fact that "there is sufficient reason to be concerned that the public, or a party, will perceive some unfairness" in the situation. The Commission went on to explain that: "In short, we are exercising our inherent discretion and obligation to ensure that our adjudicatory processes remain above reproach."<sup>38</sup>

Commissioner McDowell also was faced with a difficult ethical decision in 2006 when he had to decide whether to disqualify himself from consideration of the AT&T/Bell South merger.<sup>39</sup> In that situation, he had a memorandum from the Commission's General Counsel concluding that the government's interest in the matter outweighed the concerns about an apparent conflict of interest. Nonetheless, Commissioner McDowell, in part heeding the caution of the OGE Director that it was a "very, very close call," chose to disqualify himself, noting: "We must never lose sight of the fact that the ultimate shareholders in every endeavor we embark upon are the American people. In this vein, it is incumbent upon every public servant to do all that he or she can to earn the public's trust in the integrity and impartiality of their government."<sup>40</sup>

Federal courts have also held that it can be appropriate to overturn a prior decision in light of ethics violations. In *United State v. Medico*, a federal court held that a prior government employee

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<sup>37</sup> *In Re Applications of Commercial Radio Institute, Inc. Columbus, Ohio, et al.*, Memorandum Opinion and Order, 73 FCC 2d 776, 779 (1979).

<sup>38</sup> *Id.* at 783.

<sup>39</sup> Statement of Commissioner Robert M. McDowell, RE: Application for Transfer of Control Filed by AT&T Inc. and Bell South Corporation, *Memorandum Opinion and Order*, WC Docket No. 06-74 (22 FCC Rcd 5662), 2006 FCC LEXIS 6584 (Dec. 18, 2006).

<sup>40</sup> *Id.* at \*\* 6-7, 10, 11.

had violated Section 207 when he represented a defense contractor on a matter related to one he had worked on while employed by the Army.<sup>41</sup> As a result, the court voided the underlying contract, indicating that “the effect of a § 207 violation is to render any contract tainted with such conflict unenforceable.”<sup>42</sup> In a similar matter, *United States v. Mississippi Valley Generation Co.*, the United States Supreme Court found a contract unenforceable because it was tainted by a violation of an ethics statute.<sup>43</sup> The Supreme Court reasoned:

If the Government’s sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress as conferred.<sup>44</sup>

Similarly, the right choice in this matter compels that the Commission to grant WealthTV’s Petition for Reconsideration for further proceedings on these issues.

***C. The Commission Should Reconsider this Matter in View of Inadequate and Inconsistent Procedural Standards Regarding the Program Carriage Rules and in Light of Pending Revisions and Rulemaking***

Reconsideration is also appropriate in light of the lack of appropriate and consistent standards applicable to program carriage cases. It is clear from the record in this proceeding, other recent program carriage rulings and the fact that the Commission now has underway a revamping of the program carriage rules that the WealthTV case was considered and ruled on without proper guidance or consistency.

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<sup>41</sup> 609 F. Supp. 98, 103 (N.D. Ill. 1985).

<sup>42</sup> *Id.* at 101.

<sup>43</sup> 364 U.S. 520, 563 (1961)

<sup>44</sup> *Id.*

As discussed in greater detail below, there are three specific areas where this lack of structure is apparent. First, the Commission expressly notes in the Order that it lacked guidance as to how to deal with issues of burden of proof. Second, in the Tennis Channel HDO, *infra*, the Media Bureau clearly admits that it applied an inconsistent and incorrect standard in the WealthTV HDO regarding the *prima facie* case made by WealthTV. Third, it is clear from the Enforcement Bureau Comments in the Tennis Case, *infra*, that there are inconsistent standards applied in making the determination of what programming is “substantially similar”.

1. Lack of Standards Regarding the Burden of Proof

Reconsideration is appropriate given the Commission’s own recognition that the program carriage rules failed to provide adequate guidance with respect to which entity in the original hearing had the burden of proof, and the fact that according to reports the Commission is currently voting on an Order and Notice of Proposed Rulemaking to revise program access rules and presumably to provide such guidance. It is unfair and unreasonable for the Commission to both allow the *Recommended Decision* to stand despite Media Bureau’s finding that WealthTV had established its *prima facie* case and that the burden of proof fell on the MVPDs, while at the same time adopting rules seeming to ensure that the same issue doesn’t arise in a subsequent proceeding. Such a ruling would create more confusion and a double-standard and serve only to complicate and disrupt the program carriage complaint process.

The ALJ’s *Recommended Decision* ignored and contravened the finding of the Media Bureau that WealthTV had established a *prima facie* showing of discrimination in violation of the Commission’s rules. The Order thus disregarded relevant precedent of a burden-shifting framework under anti-discrimination provisions of the Cable Act<sup>45</sup> and the Commission’s program carriage

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<sup>45</sup> Pub. L. 102-385, 106 Stat. 1460.

regulations and erroneously allocated the burden of proceeding and proof to WealthTV. The ALJ arbitrarily and erroneously disregarded the *HDO*'s findings and Media Bureau precedent.<sup>46</sup>

The Commission should have rejected this allocation of the burden of proof as a matter of law. An administrative law judge has no authority to act inconsistently with the terms of a hearing designation order<sup>47</sup> and the Commission had no valid basis to conclude that defendants would have prevailed even if the lawful precedent had been followed and the Media Bureau's allocation of burden of proof to the defendants had been properly observed.

Instead, the Commission dismissed WealthTV's argument with a broad statement:

. . . [W]e agree with the ALJ's conclusion that the allocation of the burdens is "immaterial to the [ultimate] decision" inasmuch as "the preponderance of the evidence, viewed in its entirety, demonstrates that the defendants never violated Section 616 of the Act or section 76.1301(c) of the rules." We conclude that the defendants would have prevailed even if they had been required to carry the burdens of production and proof, as WealthTV contends was proper.

Despite the magnitude of this decision, the Commission did not provide even a glimpse into how it weighed the complicated facts in this case. The *Recommended Decision* included over 30 pages discussing the ALJ's finding of facts and conclusions of law, but the Commission dispensed with a critical element of this case with a broad conclusion and no detailed support.

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<sup>46</sup> See *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783, 15792-93 (MB 2008) (an arbitrator applied program access and program carriage decisions, concluding that "the claimant must establish a prima facie case of discrimination as defined by the applicable statute, at which point the burden shifts to the respondent to justify treatment of [the] non-affiliated programmer." (internal citation omitted)) *rev'd on other grounds TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099 (2010).

<sup>47</sup> *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 486 (¶ 11) (1981) (no authority to consider matters already considered by operating bureau in designating applications for hearing); *Algreg Cellular Engineering*, 9 FCC Rcd 5098, 5145 (¶75) (Rev.Bd. 1994) (ALJ has no authority to grant exceptors' request to confine the intervenors' participation to the Applicants where HDO accorded the intervenors full party status).



In addition, the Commission expressly conceded its lack of basis in law to affirm the ALJ's burden-shifting, as it notes:

We recognize that it would be helpful for us to provide guidance on the proper allocation of the burdens of proceeding and proof in program carriage cases that are designated for hearing. *To that end, we anticipate initiating a rulemaking preceding that will seek comment on this and other issues regarding the program carriage rules, which will afford all interested parties an opportunity to present their views.*<sup>48</sup> (Emphasis added.)

According to press reports, it now appears that such rulemaking is imminent.<sup>49</sup>

## 2. Prejudicial Information in the WealthTV HDO

Furthermore, it is quite clear that the Commission applied inconsistent and potentially prejudicial information in the HDO to the great detriment of WealthTV. The Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture in the case of *The Tennis Channel, Inc. vs. Comcast Cable Communications, Inc.* released October 5, 2010<sup>50</sup> (“*Tennis Channel Case*” and “*Tennis Channel HDO*”, respectfully), contains an admission by the Media Bureau that it may have mishandled the HDO in WealthTV by setting out the counter-arguments to WealthTV's *prima facie* case and possibly implying to the ALJ that the Bureau was advocating the arguments of the MVPDs.<sup>51</sup> In the Tennis HDO, the Media Bureau notes that it did not articulate such counter-arguments in prior cases and in the Tennis Case the Bureau indicated that it was reverting back to prior practices. Expressly citing the WealthTV HDO, the Bureau further states the following:

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<sup>48</sup> *Order* at ¶ 18, n. 50.

<sup>49</sup> See Jonathan Make, *Program Carriage Final Vote by FCC Nears; All Democrats Backing Draft*, COMMUNICATIONS DAILY, July 5, 2011, at 4.

<sup>50</sup> *In the Matter of THE TENNIS CHANNEL, INC. v. COMCAST CABLE COMMUNICATIONS, LLC*, Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149 (MB 2010).

<sup>51</sup> *Id.* at 14149-50, n.3

We note that in the most recent program carriage decisions making a *prima facie* determination, the Bureau provided a detailed discussion of the defendant's counter-arguments to each of the claims made by the complainant. *See Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14792-814 (MB 2008) (“*WealthTV HDO*”); . . . . The Bureau did not follow this approach, however, in earlier program carriage cases. . . . *We believe the approach taken in MASN I HDO and Classic Sports is more appropriate for a prima facie determination, which requires the Bureau to assess the evidence set forth in the complaint. Moreover, providing a detailed discussion of the defendant's counter-arguments to each of the claims made by the complainant may incorrectly imply that the Bureau is taking a position on the merits of those arguments.* While we do not summarize each of Comcast's counter-arguments below, our review of the existing record, including Comcast's Answer, makes clear that there are substantial and material questions of fact as to whether Comcast has engaged in conduct that violates the program carriage provisions of the Act and the Commission's rules.<sup>52</sup> (Emphasis added.)

Additional trade press reports and *ex parte* filings confirm that the new program carriage rules may grant an independent programmer that is already carried on a cable system prior to a carriage dispute the right to maintain coverage on the system during the complaint proceeding if the programmer can make a *prima facie* showing to the Media Bureau.<sup>53</sup> Given this information, one can logically assume that either the new rules, the FCC's discussion of those rules, or the associated Notice of Proposed Rulemaking will address the *prima facie* burden shifting problem that arose in the WealthTV complaint proceeding and will likely address the improper inclusion of counter-arguments to the *prima facie* case in hearing designation orders.

Should the Commission now provide clarification or explicitly begin the process of adopting rules to resolve the very problems at issue in this matter, especially when the *Order* is just one month old, fairness and reasonableness dictate that the Commission reconsider this matter in light of

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<sup>52</sup> *Id.*

<sup>53</sup> *See e.g.*, Brooks Boliek, *FCC Mulls Cable Programming Disputes*, POLITICOPRO, July 6, 2011; NCTA, *In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42 (filed July 6, 2011).

changes to the rules and clarification. Allowing the ALJ's decision to stand would create a double-standard that at a minimum would cause confusion during the period before any new rules become effective or while a rulemaking proceeding is pending, and serve only to complicate and disrupt the program carriage complaint process.

In addition, the *Order*, while affirming the *Recommended Decision's* finding that it would have been "fundamentally unfair" to allegedly shift the burden of proof to the MVPDs retroactively, ignores the fundamental unfairness to WealthTV that occurred when the ALJ disregarded the finding of the Media Bureau that WealthTV had established its *prima facie* case.

3. Inconsistent Standards for Determining "Substantially Similar" Programming

Recent admissions and statements of the Enforcement Bureau filed in the Tennis Channel Case concede that there is a lack of any clear and consistent guidelines as to how to determine whether programming channels are "substantially similar," and include an admission by the Commission that standards are lacking.<sup>54</sup> The Enforcement Bureau states, "Although Section 76.1301(c) was adopted in 1993, *there is a scarcity of guidance and case law on the specific subject of program carriage discrimination.*"<sup>55</sup> The Enforcement Bureau concluded that the Tennis Channel is closely aligned with both, the Golf Channel and Versus, and used a "broad category" classification determining that all three networks are sports programming related. The Enforcement Bureau clearly notes that Golf and Tennis "obviously" provide programs related to different athletic activities. Contrast this to the facts presented during the WealthTV case. MVPD-owned iN DEMAND's own programming executive stated that MOJO was a "high definition", "lifestyle"

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<sup>54</sup> *In the Matter of THE TENNIS CHANNEL, INC. v. COMCAST CABLE COMMUNICATIONS, LLC*, Enforcement Bureau's Comments, MB Docket No. 10-204, File No. CSR-82588-P (filed July 8, 2011) ("EB Comments").

<sup>55</sup> *Id.* at ¶ 8.

channel for the “male affluent educated demographic” – which is substantially similar to WealthTV.<sup>56</sup>

In 2007, when WealthTV filed its first complaint, MOJO and WealthTV were two of only a small percentage of “high definition” channels. That similarity is largely ignored in the ALJ’s *Recommended Decision*, as is evidence that both WealthTV and MOJO had at least one common advertiser (Grey Goose vodka) and had pursued another common sponsor (Bose). Instead, the ALJ relied in large part on the testimony of Comcast’s “expert” witness, Michael Eagan, giving apparent weight to Mr. Eagan’s finding that the “look and feel” of MOJO and WealthTV were different.<sup>57</sup> Yet, in the Tennis Channel case, the Enforcement Bureau dismisses that same witness’s (i.e., Mr. Eagan) “feelings” noting that such subjective assessment does not overcome compelling quantitative evidence.<sup>58</sup>

In fact, the Commission has been previously cautioned against attempts to apply unclear standards that are based on “administrative feel.” In *Central Florida Enterprises, Inc., v. F.C.C.*,<sup>59</sup> the D.C. Circuit rejected the Commission’s reliance on broadcast renewal hearing standards that were not clear, and held that: “The Commission nowhere even vaguely described how it aggregated its findings into the decisive balance; rather, we are told that the conclusion is based on ‘administrative

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<sup>56</sup> See Tr. At 4282, 4327, 4332, and 4402 (Asch).

<sup>57</sup> See *Recommended Decision* at ¶ 23..

<sup>58</sup> *EB Comments* at ¶ 16. The different standard applied by the Enforcement Bureau in the Tennis Case is also reflected in the treatment of testimony of Comcast employee Madison Bond. In the WealthTV ALJ Decision, Mr. Bond’s testimony is frequently cited to support the *Recommended Decision* (see e.g., *Recommended Decision* at ¶¶ 64 (n. 248), 69 (n.266)) and in that proceeding WealthTV’s effort to introduce evidence undermining Mr. Bond’s credibility was denied by the ALJ and affirmed by the Order. But that same witness (Mr. Bond) in the Tennis Channel Case is shown to have little credibility. (See *EB Comments* at ¶20, n. 38).

<sup>59</sup> 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979) (subsequent history omitted)

‘feel.’ Such intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary.”<sup>60</sup>

It is thus readily apparent that evaluative standards are lacking.

### III. CONCLUSION

Recently ascertained facts compel that the Commission reconsider its decision to adopt the ALJ’s *Recommended Decision* in the program carriage complaint proceedings between WealthTV and the MVPDs, and remand the matter for further proceedings, including re-hearing, as may be appropriate, or such other proceedings as may be necessary or appropriate.

Respectfully submitted,

Herring Broadcasting, Inc. d/b/a WealthTV

By: 

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Stephen Díaz Gavin  
Mark C. Ellison  
Ryan W. King  
PATTON BOGGS LLP  
2550 M Street NW  
Washington, DC 20037  
(202) 457-6000

Its Counsel

Dated: July 13, 2011

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<sup>60</sup> *Id.* at 50 (internal footnote omitted).

## CERTIFICATE OF SERVICE

I, Ryan W. King, certify on this 13th of July, 2011, a copy of the foregoing Petition for Reconsideration has been served via first class mail, postage pre-paid, to the following:

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\_\_\_\_\_/s/\_\_\_\_\_  
Ryan W. King

## **EXHIBITS**

- A. Declaration of Robert Herring, Herring Broadcasting d/b/a WealthTV
- B. WealthTV's FOIA Request of May 12, 2011
- C. Response to WealthTV's FOIA Request of May 12, 2011
- D. WealthTV's FOIA Request of May 20, 2011
- E. Response to WealthTV's FOIA Request of May 20, 2011
- F. Further Correspondence Regarding FOIA Request of May 20, 2011

## **EXHIBIT A**



**Before the  
Federal Communications Commission  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
	)	MB Docket No. 08-214
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P
Complainant	)	
v.	)	
Time Warner Cable Inc.	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7822-P
Complainant	)	
v.	)	
Bright House Networks, LLC,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7829-P
Complainant	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	

**DECLARATION OF ROBERT HERRING**  
**HERRING BROADCASTING, INC. D/B/A WEALTHTV**

I have reviewed the foregoing Petition for Reconsideration and declare under penalty of perjury that the facts stated therein are true and correct to the best of my knowledge and belief.

Executed on this 12 day of July, 2011.



Name: Robert Herring  
Chief Executive Officer  
Herring Broadcasting, Inc. d/b/a WealthTV

## **EXHIBIT B**

**From:** Robert Herring [mailto:robert.herring@wealthtv.com]  
**Sent:** Thursday, May 12, 2011 2:07 PM  
**To:** Laurence Schecker  
**Cc:** Austin Schlick; Ellison, Mark  
**Subject:** Freedom of Information Act Request

RE: Freedom of Information Act Request

Date: May 12, 2012

Requested by: Robert Herring, CEO WealthTV  
Daytime Phone: 858-270-6900  
Daytime Email: robert@wealthtv.com  
Maximum Initial Search Fee: \$1,000.000

Dear FOIA Request:

Under the Freedom of Information Act, I'd like to request all records regarding the following:

1. When did Commissioner Baker and Comcast initially have job solicitation discussions?
2. When did Commissioner Baker notify the FCC that she was recusing herself on any issues due to job related discussions with Comcast? What items did Commissioner Baker recuse herself from?
3. Did Commissioner Baker or her staff participate in discussions of WealthTV's complaints, including but not limited to File No. CSR-7907-P, after she initially engaged in job solicitation discussions with Comcast?
4. With respect to WealthTV's carriage access complaints, including but not limited to File No. CSR-7907-P Against Comcast, has Commissioner Baker or her staff been given access to the circulated item(s) post Commissioner Baker's initial job solicitation with Comcast?
5. Has Commissioner Baker or her staff engaged in any discussion under Docket No. 07-42 after she participated in job related discussions with Comcast?

I would appreciate your prompt response to these requests.  
Thank you for your prompt assistance with this request.

Robert Herring  
CEO  
WealthTV  
4757 Morena Blvd  
San Diego, CA 92117  
858-270-6900

Robert@wealthtv.com

## **EXHIBIT C**

**From:** FOIA <[FOIA@fcc.gov](mailto:FOIA@fcc.gov)>

**Date:** Fri, 13 May 2011 07:27:22 -0400

**To:** Robert Herring <[Robert.herring@wealthtv.com](mailto:Robert.herring@wealthtv.com)>

**Cc:** Patricia Quartey <[Patricia.Quartey@fcc.gov](mailto:Patricia.Quartey@fcc.gov)>, Shoko Hair <[Shoko.Hair@fcc.gov](mailto:Shoko.Hair@fcc.gov)>

**Subject:** FW: Freedom of Information Act Request

Dear Mr. Herring:

This acknowledges receipt of your Freedom of Information Act (FOIA) request filed with the Federal Communications Commission (FCC). Your request has been assigned FOIA control number 2011-361. Agencies are allowed 20 working days to respond to your request, extending this period for an additional 10 workingdays under certain circumstances. See 5 U.S.C. § 552(a)(6)(A)(i) and 5 U.S.C. § 552(a)(6)(B)(i). We anticipate responding to your request on 06/13/11. If additional time is needed to respond to your requests you will be notified.

If you have any questions concerning this notice, please call the FOIA Office at: (202) 418-0440.

FCC

FOIA Office

**From:** Robert Herring [<mailto:robert.herring@wealthtv.com>]

**Sent:** Thursday, May 12, 2011 2:07 PM

**To:** Laurence Schecker

**Cc:** Austin Schlick; Ellison, Mark

**Subject:** Freedom of Information Act Request

RE: Freedom of Information Act Request

Date: May 12, 2012

Requested by: Robert Herring, CEO WealthTV

Daytime Phone: 858-270-6900

Daytime Email: [robert@wealthtv.com](mailto:robert@wealthtv.com)

Maximum Initial Search Fee: \$1,000.000

Dear FOIA Request:

Under the Freedom of Information Act, I'd like to request all records regarding the following:

1. When did Commissioner Baker and Comcast initially have job solicitation discussions?
2. When did Commissioner Baker notify the FCC that she was recusing herself on any issues due to job related discussions with Comcast? What items did Commissioner Baker recuse herself from?

3. Did Commissioner Baker or her staff participate in discussions of WealthTV's complaints, including but not limited to File No. CSR-7907-P, after she initially engaged in job solicitation discussions with Comcast?
4. With respect to WealthTV's carriage access complaints, including but not limited to File No. CSR-7907-P Against Comcast, has Commissioner Baker or her staff been given access to the circulated item(s) post Commissioner Baker's initial job solicitation with Comcast?
5. Has Commissioner Baker or her staff engaged in any discussion under Docket No. 07-42 after she participated in job related discussions with Comcast?

I would appreciate your prompt response to these requests.

Thank you for your prompt assistance with this request.

Robert Herring

CEO

WealthTV

4757 Morena Blvd

San Diego, CA 92117

858-270-6900

[Robert@wealthtv.com](mailto:Robert@wealthtv.com)

**From:** Laurence Schecker <[Laurence.Schecker@fcc.gov](mailto:Laurence.Schecker@fcc.gov)>  
**Date:** Tue, 28 Jun 2011 11:54:39 -0400  
**To:** Robert Herring <[robert.herring@wealthtv.com](mailto:robert.herring@wealthtv.com)>  
**Subject:** FOIA 2011-361

Dear Mr. Herring:

Attached is the letter responding to your above-numbered Freedom of Information Act (FOIA) request and the documents being released to you today.

Sincerely,

Larry Schecker

<<FOIA 2011-361 -- WealthTV -- Initial Response.pdf>> <<Documents for Commissioner Baker Related FOIAs redacted 2011-361.pdf>>

Laurence H. Schecker  
Special Counsel  
Federal Communications Commission  
Office of General Counsel  
Administrative Law Division  
445 - 12th Street, SW  
Washington, DC 20554  
202.418.1717

*Please consider the environment before printing this email or attachments.*





Federal Communications Commission  
Washington, D.C. 20554

June 28, 2011

Mr. Robert Herring  
WealthTV  
4757 Morena Boulevard  
San Diego, CA 92117

Re: FOIA Control No. 2011-361

Dear Mr. Herring:

This responds to your Freedom of Information Act (FOIA) request filed May 13, 2011, for records regarding:

1. Initial job solicitation discussions between former Commissioner Meredith Attwell Baker and Comcast;
2. When former Commissioner Baker notified the Commission she was recusing herself on any issues;
3. What items former Commissioner Baker recused herself from;
4. Whether former Commissioner or her staff participated in any discussions concerning WealthTV's complaints after she engaged in job discussions with Comcast;
5. Whether former Commissioner Baker or her staff had "been given access to" the circulated item(s) concerning Wealth TV's carriage access complaints after she engaged in job discussions with Comcast; and
6. Whether former Commissioner Baker or her staff engaged in any discussions under Docket No. 07-42 after she engaged in job discussions with Comcast.

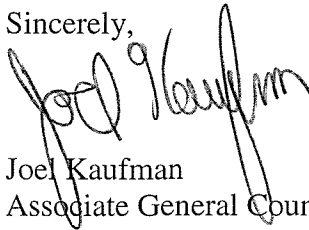
We have located records responsive to your request, copies of which are attached. We have redacted portions of the records pursuant to the deliberative process privilege of FOIA Exemption 5. This facet of the exemption is intended to "prevent injury to the quality of agency decisions." *See NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975). You may wish to review the transcript of the General Counsel's press conference where he discussed the Commissioner's departure. A copy is attached.

We also review the records to determine if discretionary release is appropriate. *See Memorandum to Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 FR 4683 (2009) (President Obama's memorandum concerning the FOIA); *The Freedom of Information Act (FOIA)*, available at <<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>> (Attorney General Holder's FOIA Memo). The portions of the records released to you take into account our obligation to make discretionary releases, where possible, and to segregate and release portions of records not properly withheld under a FOIA exemption.

You are considered a commercial use requester for FOIA fee purposes, 47 C.F.R. § 0.466(a)(4), responsible for all costs of processing your request. 47 C.F.R. § 0.470(a)(1)(i). A total of two hours were spent by GS-15 employees searching for and reviewing the records located in response to your request, billed at \$80.65 per hour (see [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-290619A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-290619A1.pdf)). In addition, 26 pages are being provided to you at \$0.10 per page (47 C.F.R. § 0.465(c)(2)). Therefore, you will shortly receive a bill for \$163.90 from the Financial Operations Division.

If you consider this to be a denial of your FOIA request, you may seek review by filing an application for review with the Office of General Counsel within 30 days of the date of this letter. 47 C.F.R. § 0.461(j).

Sincerely,

A handwritten signature in black ink, appearing to read "Joel Kaufman", written over the printed name and title.

Joel Kaufman  
Associate General Counsel and  
Chief, Administrative Law Division

Enclosures

cc: FOIA Officer

## MAB

---

**Subject:** Mtg. with Pat Carney  
**Location:** MAB office  
  
**Start:** Mon 4/18/2011 2:30 PM  
**End:** Mon 4/18/2011 3:00 PM  
  
**Recurrence:** (none)

**MAB**

---

**From:** MAB  
**Sent:** Monday, April 18, 2011 3:07 PM  
**To:** Austin Schlick; Patrick Carney  
**Subject:** Recusal from NBC matters

Austin:

Tomorrow I am going to begin exploratory conversations with NBC Universal about potential employment. While I understand the position would be for NBCU, until I have more details, I would like to recuse myself from both broadcast as well as cable matters that would have a direct and predictable effect on either NBC or Comcast. At this time, I would like to keep this recusal confidential. I will update you as I have more information.

Thank you,  
Meredith Baker

5/18/2011

## Laurence Schecker

---

**From:** Coltharp, Jim [Jim\_Coltharp@Comcast.com]  
**Sent:** Thursday, May 05, 2011 2:35 PM  
**To:** Tasha Kinney  
**Cc:** Jennifer Tatel  
**Subject:** Request for meeting with Jennifer (Program Carriage) -- Tues afternoon 5/10 or Weds 5/11  
**Follow Up Flag:** Follow up  
**Flag Status:** Yellow

Hello Tasha –

This is to request a meeting on Tuesday afternoon, May 10 or Wednesday, May 11, to discuss the program carriage rulemaking.

I would expect to have with me David Murray and Ryan Wallach from Willkie Farr & Gallagher.

Thank you,  
Jim Coltharp

**James Coltharp**

**comcast**

300 New Jersey Avenue, NW  
Suite 700  
Washington, DC 20001

[jim\\_coltharp@comcast.com](mailto:jim_coltharp@comcast.com)  
202 638-5678

\*Please note new address as of October 25, 2010. Phone and email have remained the same.

6/19/2011

**Brad Gillen**

---

**From:** MAB  
**Sent:** Friday, May 06, 2011 3:18 PM  
**To:** Brad Gillen  
**Subject:** Pat Carney

(b)(5)



## MAB

---

**Subject:** Meet with Austin and Pat  
**Start:** Mon 5/9/2011 5:00 PM  
**End:** Mon 5/9/2011 5:30 PM  
**Recurrence:** (none)

**MAB**

---

**From:** MAB  
**Sent:** Tuesday, May 10, 2011 5:20 PM  
**To:** Austin Schlick  
**Cc:** Patrick Carney  
**Subject:** Re: Recusal Question

Just fine. Thank you.

---

**From:** Austin Schlick  
**To:** MAB  
**Cc:** Patrick Carney  
**Sent:** Tue May 10 17:01:34 2011  
**Subject:** RE: Recusal Question

I believe I know the answer, but I'd like to consult with Pat and give you an answer in the morning, if that is sufficiently timely.

---

**From:** MAB  
**Sent:** Tuesday, May 10, 2011 3:52 PM  
**To:** Austin Schlick  
**Cc:** Patrick Carney  
**Subject:** Recusal Question

In our discussions of recusal, I would like to address a specific detail. Pursuant to a permanent restriction on any former employee's representations to the US concerning a particular matter in which the employee participated personally and substantially. Would I be recused from advocating on behalf of NBCU about the merger proceeding conditions for life? And could you give me an idea as to the breadth of that recusal?  
Thanks

5/18/2011



**MAB**

---

**From:** MAB  
**Sent:** Tuesday, May 10, 2011 3:52 PM  
**To:** Austin Schlick  
**Cc:** Patrick Carney  
**Subject:** Recusal Question

In our discussions of recusal, I would like to address a specific detail. Pursuant to a permanent restriction on any former employee's representations to the US concerning a particular matter in which the employee participated personally and substantially. Would I be recused from advocating on behalf of NBCU about the merger proceeding conditions for life? And could you give me an idea as to the breadth of that recusal?

Thanks

5/24/2011

**MAB**

---

**From:** MAB  
**Sent:** Wednesday, May 11, 2011 9:43 AM  
**To:** 'Zachem, Kathy'; 'Kyle McSlarrow'  
**Subject:** FW: Recusal Question

---

**From:** Austin Schlick  
**Sent:** Wednesday, May 11, 2011 9:23 AM  
**To:** MAB  
**Cc:** Patrick Carney  
**Subject:** RE: Recusal Question

Commissioner:

The relevant restriction will be a permanent prohibition on representing Comcast/NBCU (or anyone else) before a federal agency or court in the "same" particular matter as the merger proceeding. At least initially, that prohibition would reach any proceeding before the FCC involving Comcast/NBCU's compliance with, or modification or enforcement of, the Commission's merger conditions. It would not reach interactions, disputes, or arbitrations between Comcast/NBCU and third parties (such as third-party programmers or network affiliates), even if they are affected by provisions in the merger conditions. Nor would it reach discussions with Congress about the merger conditions. Over time, moreover, factual changes may result in items growing out of the merger no longer being treated as the "same" matter for purposes of the post-employment restrictions -- but that would be a fact-specific determination that would best be discussed with OGC at the relevant time.

Please let Pat or me know if you have any questions.

Austin

---

**From:** MAB  
**Sent:** Tuesday, May 10, 2011 3:52 PM  
**To:** Austin Schlick  
**Cc:** Patrick Carney  
**Subject:** Recusal Question

In our discussions of recusal, I would like to address a specific detail. Pursuant to a permanent restriction on any former employee's representations to the US concerning a particular matter in which the employee participated personally and substantially. Would I be recused from advocating on behalf of NBCU about the merger proceeding conditions for life? And could you give me an idea as to the breadth of that recusal?  
Thanks

5/24/2011

**Brad Gillen**

---

**From:** Austin Schlick  
**Sent:** Wednesday, May 11, 2011 5:16 PM  
**To:** Patrick Carney; Brad Gillen  
**Cc:** Joel Kaufman  
**Subject:** RE: Voting

(b)(5)

A large black rectangular redaction box covering the body of the email.

---

**From:** Patrick Carney  
**Sent:** Wednesday, May 11, 2011 4:55 PM  
**To:** Brad Gillen  
**Cc:** Joel Kaufman; Austin Schlick  
**Subject:** RE: Voting

(b)(5)

A large black rectangular redaction box covering the body of the email.

---

**From:** Brad Gillen  
**Sent:** Wed 5/11/2011 4:41 PM  
**To:** Patrick Carney  
**Subject:** Voting

(b)(5)

A large black rectangular redaction box covering the body of the email.

Brad Gillen  
Legal Advisor - Wireline  
Commissioner Meredith Baker  
[bradley.gillen@fcc.gov](mailto:bradley.gillen@fcc.gov)  
202.418.2400

\*\*\* Non-Public: For Internal Use Only \*\*\*

5/23/2011

**Brad Gillen**

---

**From:** Austin Schlick  
**Sent:** Wednesday, May 11, 2011 7:44 PM  
**To:** Brad Gillen  
**Cc:** Charles Mathias; Jennifer Tatel  
**Subject:** Recusal

(b)(5)



By the Commission: Chairman Martin and Commissioner Tate issuing a joint statement;  
Commissioners Copps and Adelstein concurring and issuing separate statements;  
Commissioner McDowell not participating.

**MAB**

---

**From:** Austin Schlick  
**Sent:** Thursday, May 12, 2011 12:09 PM  
**To:** MAB  
**Cc:** Lori Alexiou  
**Subject:** Press is going to ask me

(b)(5)



**MAB**

---

**From:** MAB  
**Sent:** Thursday, May 12, 2011 12:11 PM  
**To:** Austin Schlick  
**Subject:** RE: Press is going to ask me

(b)(5)

A large black rectangular redaction box covering several lines of text.

-----Original Message-----

**From:** Austin Schlick  
**Sent:** Thursday, May 12, 2011 12:09 PM  
**To:** MAB  
**Cc:** Lori Alexiou  
**Subject:** Press is going to ask me

(b)(5)

A large black rectangular redaction box covering several lines of text.

**MAB**

---

**From:** Austin Schlick  
**Sent:** Thursday, May 12, 2011 12:13 PM  
**To:** MAB  
**Subject:** Re: Press is going to ask me

(b)(5)



----- Original Message -----

**From:** MAB  
**To:** Austin Schlick  
**Sent:** Thu May 12 12:11:00 2011  
**Subject:** RE: Press is going to ask me

(b)(5)



-----Original Message-----

**From:** Austin Schlick  
**Sent:** Thursday, May 12, 2011 12:09 PM  
**To:** MAB  
**Cc:** Lori Alexiou  
**Subject:** Press is going to ask me

(b)(5)



**MAB**

---

**From:** MAB

**Sent:** Thursday, May 12, 2011 12:15 PM

**To:** Austin Schlick

**Subject:** Letter to House Commerce Committee

(b)(5)



5/18/2011



**MAB**

---

**From:** Austin Schlick  
**Sent:** Thursday, May 12, 2011 12:22 PM  
**To:** MAB  
**Cc:** Kim Mattos  
**Subject:** Re: Letter to House Commerce Committee

Sure. Kim, pls find a time with Lori.

---

**From:** MAB  
**To:** Austin Schlick  
**Sent:** Thu May 12 12:15:27 2011  
**Subject:** Letter to House Commerce Committee

(b)(5)



5/18/2011

## MAB

---

**Subject:** Austin

**Start:** Thu 5/12/2011 4:30 PM  
**End:** Thu 5/12/2011 5:00 PM

**Recurrence:** (none)

**MAB**

---

**From:** Austin Schlick  
**Sent:** Thursday, May 12, 2011 6:32 PM  
**To:** MAB  
**Subject:** 512-gen counsel on C'r Baker Recusals  
**Attachments:** 512-gen counsel on C'r Baker Recusals.doc

FYI.

5/18/2011

General Counsel Austin Schlick Q&A with Press following 5/12/11 FCC Agenda Meeting

Todd Shields, Bloomberg>> I am interested in Commissioner Baker's leaving. What do we know about her, what does the Commission now, what have you asked about her contacts with Comcast in the weeks preceding the announcement yesterday?

AS>> The commissioner, in accordance with our recommended practice for senior officials, contacted me, and we have been working closely with her to ensure compliance with all the ethical requirements. Those are requirements that, as someone asked earlier -- those requirements apply even when you are engaged in discussions with a prospective employer, not just when she leaves the commission. The same rules for all the employees and commissioners.

Shields, follow-up>> When was it that she contacted you and said, "I have been in contact with Comcast"?

AS>> Second half of April.

Lynn Stanton, TR Daily>> Ethical requirements -- I assume they apply to having to recuse yourself if there were an issue before the commission that involved Comcast?

AS>> Yes.

Stanton, follow-up>> Would only be proceedings are issues where Comcast was simply a major party, or any proceeding at which Comcast would be affected?

AS>> The latter, and there are appearances on top of that. It is a two-part test. First, impact on the potential employer. Second, appearance.

Bill Myers, Comm Daily>> Did she formally recuse herself, and was that on and your advice?

AS>> She did not participate in today's proceeding.

Myers, follow-up>> Is that a recusal?

AS>> As for what items she will and won't recuse herself from, I refer you to her. What I said to her is not up and I'm going to share with you.

Myers, follow-up>> Are you confident that her hiring passes ethical standards and regulations?

AS>> I will lay out regulations for you. There are three sources of ethical restrictions here. One is a lifetime restriction relating to particular matters in which FCC employees are engaged here in the commission. The second is a statutory prohibition on communications with a senior official's former agency. The third is the ethics pledge which takes the 1-year statutory restriction and expanded to two years and put on top of it a restriction on lobbying the executive branch.

Myers, follow-up>> Is she bound by that?

>> Yes, as a nominee and confirmed during the Obama administration, she is bound by that.

Brooks Boliek, Politico>> June 3 is the date she starts at Comcast?

AS>> That is the day she gave as departure.

Boliek, follow-up>> Between now and June 3 -- she did not participate today as a commissioner. What can she do between now -- it is only a couple of weeks.

AS>> She will make a judgment on each matter --

Boliek, follow-up>> So she can produce a judgment on circulation, or something like that --

AS>> Each is reviewed independently.

Boliek, follow-up>> She could -- I am not saying she were --

AS>> Whether or not she could it would depend on the matter.

Lynn Stanton, TR Daily>> It depends on final orders, right?

AS>> Yes.

Bill Myers, Comm Daily>> Is she allowed to have ex parte meetings?

AS>> Same rule would apply.

Myers, follow-up>> What about her staff? Are they recused as well?

AS>> I don't know why they would have a meeting on an item on which she is recused.

Todd Shields, Bloomberg>> Comcast now has interests in broadcasting, telephony, Internet, cable. There is a large universe of things in which they are involved. Would it be broadly correct to say that she cannot participate in any of those big topic areas?

[ no answer recorded in captioning ]

Lynn Stanton, TR Daily>> I don't think they have any international -- would you view them as being affected by the International items today?

AS>> I don't think I will get into that.

Stanton>> OK.

David Fiske>> I think that wraps it up. Thank you Austin.

## Commissioner Baker's Recusals (Absent/Not Participating) Between 8/4/2009 and 6/3/2011

CLAS NUM	FCC NUM	TITLE	STATUS	DATE ADOPTED	DATE RELEASED	DATE VOTE	VOTE
110073	11-85	Enforcement Bureau, Notice of Apparent Liability for Forfeiture Structure	Released	05/27/11	06/01/11	05/26/11	Absent/Not Participating
110079	11-86	and Practices of the Video Relay Service Program, Order Amendment	Released	05/31/11	05/31/11	05/31/11	Absent/Not Participating
110063	11-80	of the Commission' s Rules Regarding Maritime Automatic Identification Systems	Released	05/24/11	05/26/11	05/24/11	Absent/Not Participating
110065	11-84	Implementati on of the Commercial Advertiseme nt Loudness Mitigation (CALM) Act; Notice of Proposed Rulemaking	Released	05/27/11	05/27/11	05/27/11	Absent/Not Participating

110024	11-79	Amendment of Sections 15.35 and 15.253 of the Commission's Rules Regarding Operation of Radar Systems in the 76-77 GHz Band	Released	05/24/11	05/25/11	05/12/11	Absent/Not Participating
110055	11-76	Reporting Requirements for U.S. Providers of International Telecommunications Services. Amendment of Part 43 of the Commission's Rules	Released	05/12/11	05/13/11	05/12/11	Absent/Not Participating
100188	11-77	National Legal and Policy Center on Request for Inspection of Records, FOIA Control Nos. 2010-026, 2010-027, 2010-028, 2010-098 and 2010-135.	Released	05/17/11	05/20/11	05/13/11	Absent/Not Participating

100189	11-83	In the Matter of Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act as Amended	Released	05/25/11	05/26/11	05/13/11	Absent/Not Participating
110058	11-74	The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers	Released	05/12/11	05/13/11	05/12/11	Absent/Not Participating



110050	11-81	Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, 4th FNPRM	Released	05/24/11	05/27/11	05/24/11	Absent/Not Participating
110070	11-82	Review of the Emergency Alert System; Independent Spanish Broadcasters Association, The Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, Petition for Immediate Relief.	Released	05/25/11	05/26/11	05/24/11	Absent/Not Participating

110054	11-78	Inquiry Concerning the Deployment of Advanced Telecommun ications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommun ications Act of 1996	Released	05/20/11	05/20/11	05/12/11	Absent/Not Participating
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110056	11-75	International Settlements Policy Reform. Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon. Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct. Petit	Released	05/12/11	05/13/11	05/12/11	Absent/Not Participating
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# NEWS

**Federal Communications Commission**  
**445 12<sup>th</sup> Street, S.W.**  
**Washington, D. C. 20554**

**News Media Information 202 / 418-0500**  
**Internet: <http://www.fcc.gov>**  
**TTY: 1-888-835-5322**

---

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.  
See MCI v. FCC, 515 F 2d 385 (D.C. Circ 1974).

---

FOR IMMEDIATE RELEASE  
May 13, 2011

NEWS MEDIA CONTACT  
Jennifer Tatel (202) 418-2400

## **STATEMENT OF COMMISSIONER MEREDITH ATTWELL BAKER**

I'm proud of my nearly eight years of government service, and especially my service as an FCC Commissioner under Chairman Genachowski's leadership. Until late this spring, my plan was to seek renomination for a second term as Commissioner. That was true all through the winter during consideration of the Comcast/NBCUniversal transaction and in the months after it was completed.

Not once in my entire tenure as a Commissioner had anyone at Comcast or NBCUniversal approached me about potential employment. When this opportunity became available in mid-April, I made a personal decision that I wanted to give it serious consideration.

Therefore, I immediately sought counsel from the General Counsel of the FCC, and recused myself on April 18th from any matters involving Comcast or NBCUniversal. I have not only complied with the legal and ethical laws, but I also have gone further. I have not participated or voted any item, not just those related to Comcast or NBCUniversal, since entering discussions about an offer of potential employment. Because of this, I plan to depart the Commission as soon as I am able to ensure an orderly wind-down of my office.

I will of course comply with all government ethics and Obama pledge restrictions going forward. I am excited to embark on the next phase of my career and am grateful for having had the opportunity to work with great public servants at the FCC.

- FCC -

## **EXHIBIT D**

**From:** Robert Herring <[robert.herring@wealthtv.com](mailto:robert.herring@wealthtv.com)>

**Date:** Fri, 20 May 2011 10:09:22 -0700

**To:** <[foia@fcc.gov](mailto:foia@fcc.gov)>

**Subject:** Freedom Of Information Request

RE: Freedom of Information Act Request

Date: May 20, 2012

Requested by: Robert Herring, CEO WealthTV

Daytime Phone: 858-270-6900

Daytime Email: [robert@wealthtv.com](mailto:robert@wealthtv.com)

Maximum Initial Search Fee: \$2,500.000

Dear FOIA Request:

Under the Freedom of Information Act, I'd like to request all records regarding the following:  
Regarding the following four former senior FCC officials, Mr. Rick Chessen, Mr. Rudy Brioche, Ms. Cristina Pauze, and Ms. Catherine Bohigian:

When did Mr. Chessen report that he was directly or indirectly involved in employment discussions with the NCTA?

When did Mr. Brioche report that he was directly or indirectly involved in employment discussions with Comcast?

When did Ms. Pauze report that she was or indirectly involved in employment discussions with Time Warner Cable?

When did Ms. Bohigian report that she was directly or indirectly involved in employment discussions with Cablevision?

When did each former FCC official initially have direct or indirect employment discussions with the cable operators or cable associations shown above?

When did each former FCC official notify the FCC that she/he was recusing himself /herself on any issues due to job related discussions that posed a conflict of interest?

When did the FCC take steps to ensure that these four former FCC officials did not work on items that may pose a conflict of interest?

With respect to WealthTV's carriage access discrimination complaints (CSR-7907-P, CSR-7829-P, CSR-7822-P, CSR-7709-P), did any of the four former FCC officials engage in any discussions, communications, meetings, or exchanges of opinion, as FCC representatives AFTER directly or indirectly becoming involved in employment discussions as cited above.

Thank you for your prompt assistance with this request.

Robert Herring

CEO

WealthTV

4757 Morena Blvd

San Diego, CA 92117

858-270-6900

[Robert@wealthtv.com](mailto:Robert@wealthtv.com)

## **EXHIBIT E**

**From:** Laurence Schecker <[Laurence.Schecker@fcc.gov](mailto:Laurence.Schecker@fcc.gov)>  
**Date:** Tue, 28 Jun 2011 17:57:28 -0400  
**To:** Robert Herring <[robert.herring@wealthtv.com](mailto:robert.herring@wealthtv.com)>  
**Subject:** FOIA 2011-383

Dear Mr. Herring:

Attached is the letter responding to your above-numbered Freedom of Information Act (FOIA) request and the documents being released to you today.

Sincerely,

Larry Schecker

<<FOIA 2011-383 -- Herring WealthTV -- Initial.pdf>> <<FOIA 2011-383 -- Document.pdf>>

Laurence H. Schecker  
Special Counsel  
Federal Communications Commission  
Office of General Counsel  
Administrative Law Division  
445 - 12th Street, SW  
Washington, DC 20554  
202.418.1717

*Please consider the environment before printing this email or attachments.*





Federal Communications Commission  
Washington, D.C. 20554

June 28, 2011

Mr. Robert Herring  
WealthTV  
4757 Morena Boulevard  
San Diego, CA 92117

Re: FOIA Control No. 2011-383

Dear Mr. Herring:

This responds to your Freedom of Information Act (FOIA) request filed May 23, 2011, for records regarding actions taken by former FCC employees Rick Chessen, Rudy Brioché, Chistina Pauzé, and Catherine Bohigian to notify the Commission they were engaged in outside employment discussions. You also seek records of when these four former employees formally recused themselves from involvement in any issues as a result of their outside employment discussions. Finally, you seek records of whether any of these four former employees were engaged in any way in matters related to WealthTV's carriage access discrimination complaints after they became involved in outside employment discussions. We have located one record responsive to your request, a copy of which is attached.

You are considered a commercial use requester for FOIA fee purposes, 47 C.F.R. § 0.466(a)(4), responsible for all costs of processing your request. 47 C.F.R. § 0.470(a)(1)(i). A total of three hours were spent by GS-15 employees searching for and reviewing the records located in response to your request, billed at \$80.65 per hour (see [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-290619A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-290619A1.pdf)). In addition, one page is being provided to you at \$0.10 per page (47 C.F.R. § 0.465(c)(2)). Therefore, you will shortly receive a bill for \$242.05 from the Financial Operations Division.

If you consider this to be a denial of your FOIA request, you may seek review by filing an application for review with the Office of General Counsel within 30 days of the date of this letter. 47 C.F.R. § 0.461(j).

Sincerely,

A handwritten signature in black ink, which appears to read "Joel Kaufman".

Joel Kaufman  
Associate General Counsel and  
Chief, Administrative Law Division

Enclosure

cc: FOIA Officer

## Patrick Carney

---

**From:** Catherine Bohigian  
**Sent:** Monday, October 01, 2007 1:31 PM  
**To:** Patrick Carney  
**Subject:** RE: recusal

Thanks!

---

**From:** Patrick Carney  
**Sent:** Monday, October 01, 2007 1:25 PM  
**To:** Catherine Bohigian  
**Subject:** RE: recusal

Nope, that's it. Thanks, Catherine, and welcome back! - Pat

---

**From:** Catherine Bohigian  
**Sent:** Monday, October 01, 2007 1:18 PM  
**To:** Patrick Carney  
**Subject:** recusal

Hi, Pat. Hope you had a nice weekend. Just wanted to let you know that I called Cablevision first thing this morning to tell them I did not want the job. I am back at work today, and am going to consider myself "un-recused" as of that phone call unless for some reason there is something else I need to do. Thanks!

## **EXHIBIT F**

**From:** Robert Herring [mailto:robert.herring@wealthtv.com]  
**Sent:** Wednesday, June 29, 2011 8:02 PM  
**To:** Joel Kaufman; Laurence Schecker  
**Subject:** <no subject>

Joel I appreciate all the help and quick response. I have one last question see attached .

Thank You,

Robert



June 29, 2011

Mr. Joel Kaufman  
Associate General Counsel and Chief  
Administrative Law Division  
Federal Communications Commission  
July 13, 2010

Re: Freedom of Information Act (FOIA) filed May 23, 2011, Control Number 2011-383

Dear Mr. Kaufman:

Thank you for your timely response dated June 28, 2011 regarding my request for information regarding former FCC employees Rick Chessen, Rudy Brioché, Christina Pauze, and Catherine Bohigian.

I'd like to confirm that your response, specifically the lack of *any* records for Mr. Chessen, Mr. Brioché, and Ms. Pauze, indicates that these three individuals simply did not have any recusal discussions during their time at the FCC and not that such records are being denied for any reason. In other words, I'd like to confirm that no records exist regarding recusal discussions with Mr. Chessen, Mr. Brioché, and Ms. Pauze during their employment at the FCC.

Thank you,

Robert Herring, Sr.  
CEO, WealthTV



4757 Morena Blvd., San Diego, CA 92117 Ph: 858-270-6900 Fax 858-270-6901 [www.wealthtv.net](http://www.wealthtv.net)

Wealth - an abundance of good.

WealthTV

**From:** Laurence Schecker <[Laurence.Schecker@fcc.gov](mailto:Laurence.Schecker@fcc.gov)>

**Date:** Tue, 5 Jul 2011 12:24:09 -0400

**To:** Robert Herring <[Robert.herring@wealthtv.com](mailto:Robert.herring@wealthtv.com)>

**Cc:** Joel Kaufman <[Joel.Kaufman@fcc.gov](mailto:Joel.Kaufman@fcc.gov)>

**Subject:** RE: FOIA Control No. 2011-383

Mr. Herring, I am responding to your letter of June 29, 2011, addressed to Joel Kaufman. The Freedom of Information Act (FOIA) is the mechanism by which the public may obtain copies of Federal records as defined in 5 U.S.C. 552(f)(2)(A). With the exception of the one record provided to you on June 28, 2011, there were no records responsive to your request.

Sincerely,

Larry Schecker

Laurence H. Schecker  
Special Counsel  
Federal Communications Commission  
Office of General Counsel  
Administrative Law Division  
445 - 12th Street, SW  
Washington, DC 20554  
202.418.1717

*Please consider the environment before printing this email or attachments.*

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**From:** Robert Herring [<mailto:robert.herring@wealthtv.com>]

**Sent:** Wednesday, June 29, 2011 8:02 PM

**To:** Joel Kaufman; Laurence Schecker

**Subject:** <no subject>

Joel I appreciate all the help and quick response. I have one last question see attached .

Thank You,

Robert